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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ROMAN MONTIEL, Defendant and Appellant.	A105481 (Solano County Super. Ct. No. FCR196731)

INTRODUCTION

Roman Montiel appeals from a judgment of conviction for lewd or lascivious acts with a child (Pen. Code, § 288, subd. (a)),[1] sending harmful matter with intent to seduce a minor (§ 288.2, subd. (b)),[2] and oral copulation with a minor (§ 288a, subd. (b)(2)). He contends the trial court committed instructional error by improperly instructing on the intent element of sending harmful matter, and failing to instruct the jury on a lesser included offense.

BACKGROUND

An information charged Montiel with numerous sex offenses against his teenaged stepdaughter, J.A., and her best friend, M.H. Since the issues raised on appeal concern only his conviction for sending harmful matter with intent to seduce M.H., we will limit

[1] All statutory references are to the Penal Code.

[2] The information charging a violation of subdivision (a) of this section was amended to charge a violation of subdivision (b). The jury found him guilty of the latter offense, but the abstract of judgment mistakenly lists subdivision (a).

our discussion to that offense, of which the jury found him guilty. Resolution of the issues does not require detailed recitation of the facts of the offense. Suffice it to say the evidence established that Montiel emailed a photograph of his penis to M.H., and the girls both testified that he engaged in oral copulation with her two weeks later. Pursuant to a plea bargain involving several other counts as well, Montiel was sentenced to four years, four months in prison, and filed a timely notice of appeal.

DISCUSSION

I. Definition of "Seducing"

The trial court's instruction described the charged offense as knowingly sending "any harmful matter" to a minor by electronic mail "with the intent or for the purpose of seducing a minor," and defined the word "seducing" as "persuading into partnership in any sexual activity." On appeal, Montiel contends the court erred by failing to further instruct that the sexual activity must include "genital contact," citing *People v. Jensen* (2003) 114 Cal.App.4th 224 (*Jensen*) ("seducing" intent element requires intent to entice minor to engage in sexual act involving physical contact with perpetrator). Without a "contact" instruction, Montiel argues, the jury could have convicted him if it believed he sent M.H. a photograph of his penis with the intent of persuading her to participate only in "a continuing exchange of sexually explicit photographs."

"A trial court has a sua sponte duty (1) to instruct on general principles of law relevant to issues raised by the evidence [citations]; and (2) to give explanatory instructions when terms used in an instruction have a technical meaning peculiar to the law." (*People v. Reynolds* (1988) 205 Cal.App.3d 776, 779.) This the court did by delivering the standard instruction on the charged offense, which includes a definition of the word "seducing."[3] The instruction was not erroneous, but at worst incomplete. "Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested

[3] The instruction has since been revised to reflect the holding in *Jensen* (Com. to CALJIC No. 10.58 (Jan. 2005 ed.) p. 700), which was decided after trial but before sentencing in this case.

appropriate clarifying or amplifying language." (*People v. Andrews* (1989) 49 Cal.3d 200, 218.) Thus, as the Attorney General notes, Montiel has waived this claim by failing to object or request amplification below.[4]

II. Lesser Included Offense

Montiel suggested to the trial court that section 311.2, subdivision (a) (distribution of obscene matter) "may be a lesser" to the charged offense (sending harmful matter with intent to seduce a minor). The court disagreed that the misdemeanor, which lacks the element of intent to seduce a minor, was a lesser included offense, but in any event, it did not believe the evidence supported any lesser offense.

Regardless of whether there is a request or objection, "the trial court must instruct on a lesser offense necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser." (*People v. Birks* (1998) 19 Cal.4th 108, 118 (*Birks*).) Montiel argues that was the case here, because there was substantial evidence he did not intend to seduce M.H. within the meaning of *Jensen*, *supra*, 114 Cal.App.4th 224 (see *ante*, Part I). However, "a lesser offense is necessarily included in a greater offense [only] if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser." (*Birks*, at p. 117.) In *Jensen*, at pp. 243-245, after analyzing the elements of the two offenses at issue there, the court concluded that section 313.1, subdivision (a) (distribution of harmful matter to a minor) was a lesser included offense of section 288.2, subdivision (b) (distribution of harmful matter to a minor with intent of seduction).

Such is not the case here. The charged offense, section 288.2, subdivision (b), prohibits distribution to a minor, with the requisite intent, of "any harmful matter, as defined in Section 313." Section 313, subdivision (a) defines "harmful matter" as "matter, taken as a whole, which to the average person, applying contemporary statewide

[4] Contrary to the Attorney General's assertion, however, this is not a "pinpoint" instruction that "relates particular facts to an element of the charged crime and thereby explains or highlights a defense theory." (*People v. Mayfield* (1997) 14 Cal.4th 668, 778.)

standards, appeals to the prurient interest, and is matter which, taken as a whole, depicts or describes in a patently offensive way sexual conduct and which, taken as a whole, lacks serious literary, artistic, political, or scientific value *for minors*." (Italics added.) The allegedly lesser offense, section 311.2, subdivision (a), prohibits distribution of "any obscene matter," which is defined in language that essentially tracks the definition of "harmful matter," with the important omission of the final qualification "for minors."[5] Thus, the statutory elements of the charged offense do not include all the elements of the allegedly lesser offense; the charged offense *can* be committed without also committing the alleged lesser. That is, one can send harmful matter (no value for minors) with intent to seduce a minor, without distributing obscene matter (no value for anyone).

This could be what the trial court had in mind when it said, "I think that's the element that makes it not a lesser because this can only relate to minors, this charge." In any event, "the trial court's reliance on erroneous reasoning is no basis for reversal if the decision is correct. [Citation.] We review the correctness of the challenged ruling, not of the analysis used to reach it." (*In re Baraka H.* (1992) 6 Cal.App.4th 1039, 1045.) The trial court correctly declined to instruct the jury on misdemeanor distribution of obscene matter as a lesser included offense.

[5] " 'Obscene matter' means matter, taken as a whole, that to the average person, applying contemporary statewide standards, appeals to the prurient interest, that, taken as a whole, depicts or describes sexual conduct in a patently offensive way, and that, taken as a whole, lacks serious literary, artistic, political, or scientific value." (§ 311, subd. (a).)

DISPOSITION

The judgment is affirmed.

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STEIN, J.

We concur:

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MARCHIANO, P.J.

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MARGULIES, J.